

1 L. LIN WOOD, P.C.
2 L. Lin Wood (admitted *pro hac vice*)
3 lwood@linwoodlaw.com
4 Nicole J. Wade (admitted *pro hac vice*)
5 nwade@linwoodlaw.com
6 Jonathan D. Grunberg (admitted *pro hac vice*)
7 jgrunberg@linwoodlaw.com
8 G. Taylor Wilson (admitted *pro hac vice*)
9 twilson@linwoodlaw.com
10 1180 West Peachtree Street, Ste. 2040
11 Atlanta, Georgia 30309
12 404-891-1402; 404-506-9111 (fax)

10 WEISBART SPRINGER HAYES, LLP
11 Matt C. Wood (admitted *pro hac vice*)
12 mwood@wshllp.com
13 212 Lavaca Street, Ste. 200
14 Austin, TX 78701
15 512-652-5780
16 512-682-2074 (fax)

CHATHAM LAW GROUP
Robert Christopher Chatham
chris@chathamfirm.com
CA State Bar No. 240972
3109 W. Temple St.
Los Angeles, CA 90026
213-277-1800

15 *Attorneys for Plaintiff Vernon Unsworth*

16
17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 VERNON UNSWORTH,

20 Plaintiff,

21 v.

22 ELON MUSK,

23 Defendant.
24
25
26
27
28

Case No. 2:18-cv-08048-SVW (JC)

Judge Hon. Stephen V. Wilson

**PLAINTIFF VERNON
UNSWORTH'S OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: October 28, 2019

Time: 1:30 pm

Place: Courtroom 10A

Complaint Filed: Sept. 17, 2018

Trial Date: Dec. 3, 2019

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. FACTUAL BACKGROUND	5
A. Musk Called Unsworth a Pedophile on July 15, 2018.....	5
B. The Convicted Felon Investigator Was Told to Use Aggressive Tactics. ...	7
C. No One Told Musk that Unsworth Married or Raped Children.	9
D. Republication of the BuzzFeed Emails Was Reasonably Foreseeable.	10
III. ARGUMENT	12
A. Unsworth Is a Private Figure.	13
1. No Public Controversy at the Time of the Defamation.....	14
2. Unsworth Did Not Attempt to Influence Any Controversy	15
3. Defamation Not Germane to Participation in Controversy	15
B. All of Musk’s Accusations Were Published with Actual Malice.	17
1. The July 15 Tweets.....	19
2. The August 28 Tweet	20
3. The August 30 Emails	21
C. Republication of the August 30 Emails Was Reasonably Foreseeable.....	23
IV. CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

<i>Antonovich v. Superior Court</i> , 234 Cal. App. 3d 1041 (1991).....	19, 20, 23
<i>Brown v. Kelly Broad. Co.</i> , 48 Cal. 3d 711 (1989)	13
<i>Cohen v. Cowles Media</i> , 501 U.S. 663 (1991)	24
<i>Copp v. Paxton</i> , 45 Cal. App. 4th 829 (1996)	14
<i>D.A.R.E Am. v. Rolling Stone Mag.</i> , 101 F. Supp. 2d 1270 (C.D. Cal. 2000), <i>aff'd</i> , 270 F.3d 793 (9th Cir. 2001)	17
<i>Dawe v. Corrections USA</i> , 2010 WL 682321 (E.D. Cal. Feb. 24, 2010).....	13
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	14, 15
<i>Good Gov't Group of Seal Beach, Inc. v. Superior Court</i> , 22 Cal. 3d 672 (1978)	18
<i>Grenier v. Taylor</i> , 234 Cal. App. 4th 471 (2015).....	12, 14, 16
<i>Harte-Hanks Commc'ns, Inc. v. Connaughton</i> , 491 U.S. 657 (1989).....	23
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1979)	15
<i>Jankovic v. Int'l Crisis Grp.</i> , 822 F.3d 576 (D.C. Cir. 2016).....	15, 16
<i>Khawar v. Globe Int'l, Inc.</i> , 19 Cal. 4th 254 (1998)	13
<i>Makaeff v. Trump Univ., LLC</i> , 715 F.3d 254 (9th Cir. 2013).....	13, 14, 15
<i>Masson v. New Yorker Mag., Inc.</i> , 501 U.S. 496 (1991).....	21

1	<i>Mitchell v. Superior Court</i> , 37 Cal. 3d 268 (1984)	24
2	<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	17
3		
4	<i>Prendeville v. Singer</i> , 155 Fed. Appx. 303 (9th Cir. 2005).....	13
5	<i>Reader's Digest Ass'n v. Superior Court</i> , 37 Cal. 3d 244 (1984)	17, 21
6		
7	<i>Shively v. Bozanich</i> , 31 Cal. 4th 1230 (2003).....	23
8	<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968)	18, 19
9		
10	<i>Stoneking v. Briggs</i> , 254 Cal. App. 2d 563 (1967).....	24
11	<i>Time, Inc. v. Firestone</i> , 424 U.S. 448 (1976)	15
12		
13	<i>Waldbaum v. Fairchild Pubs., Inc.</i> , 627 F.2d 1287 (D.C. Cir.), <i>cert.</i>	
14	<i>denied</i> , 449 U.S. 898 (1980).....	14
15	<i>Westmoreland v. CBS Inc.</i> , 596 F. Supp. 1170 (S.D.N.Y 1984).....	21
16		
17	<i>Wolston v. Reader's Digest Ass'n, Inc.</i> , 443 U.S. 157 (1979).....	15
18	<i>Z.F. v. Ripon Unified Sch. Dist.</i> , 482 F. App'x 239 (9th Cir. 2012)	14
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

I. INTRODUCTION

After spending over two weeks daily working to save the lives of 12 children and their soccer coach lost deep inside a dangerous Thai cave, Vernon Unsworth will now spend the rest of his life with the asterisk of pedophilia attached to his name as the direct result of a public relations campaign of false, heinous accusations by Elon Musk, a thin-skinned billionaire who is obsessed with his public image and who has a history of vindictively and intentionally ignoring truth to maintain that PR-created image. Musk started his public campaign to falsely destroy Unsworth on Twitter by describing him as “pedo guy,” conveying that Unsworth is a pedophile. Musk then shifted gears to the mainstream media by falsely stating that Unsworth is a “child rapist” with a 12-year-old child bride. Hiding behind the litigation privilege, Musk now seeks to wrap up his campaign of false accusations against Unsworth by filing a motion that is replete with untruths and misrepresentations of the evidence so numerous that his dishonest legal tactics alone justify a denial of his motion. The only reason for Musk’s campaign of false accusations is that Musk felt insulted by one CNN International interview by Unsworth in which he stated that Musk’s child “submarine” would not work and was a PR stunt – criticisms that previously had been publicly leveled against Musk by members of the media and commentators. Like the bully that he is, Musk chose to lash out publicly at the criticism only by falsely attacking Unsworth, a relatively unknown individual, and publicly challenging him to sue for libel. Unsworth accepted Musk’s challenge in order to redress the false attacks on his reputation and in doing so, has developed a factual record that demands that his case against Musk be resolved by a jury.

The evidence unquestionably establishes that Musk’s heinous accusations against Unsworth are false, but Musk remains unwilling to admit it. In fact, Unsworth met his significant other, Tik, in a coffee shop in London in 2011, when she was 32 years old. Thereafter, he made his first visit to Thailand to visit her and explore the cave system near her residence, where the children were subsequently

1 lost in June 2018. (Pl.’s Stmt. of Addt’l Material Facts Precluding Summ. J. (“SF”)
 2 13). While Musk admitted under oath in his deposition that his accusations against
 3 Unsworth were false, he continues to assert them by alleging that he was in part
 4 relying on an “investigation” by James Howard-Higgins (“Howard”), a man he did
 5 not vet for reliability and who he now describes as a “con man” “just taking us for a
 6 ride.” (SF 17, 46; *see also* Pl.’s Resp. to Def.’s Stmt. of Uncont’d Facts (“DF”) 60-
 7 61).¹ Musk’s motion continues to trade personal responsibility and truth for a “hail
 8 Mary” legal shot at assassinating Unsworth’s character with the unverified,
 9 exaggerated, and false statements of his felonious “investigator.” In his Declaration,
 10 Musk disingenuously seeks to hide the truth of what he “learned” from his
 11 investigator with misrepresentations and omissions, but facts are stubborn things:

- 12 • Musk did not know “who in the world [Unsworth] was” on July 15 and only
 13 undertook a Google search of Unsworth and “Chiang Rai,” where he claimed
 14 to learn that Chiang Rai had a reputation for child prostitution, before posting
 15 his accusatory “pedo guy” tweet (SF 14; *see also* DF 84-85);
- 16 • Musk was forced to admit in his deposition that he did not know whether the
 17 accusations in his August 30 email to a BuzzFeed reporter that Unsworth is a
 18 child rapist with a 12-year-old child bride were “true or false” when he
 19 published them to the reporter (SF 15);
- 20 • Howard never stated that Unsworth was a pedophile or that he had a 12-year-
 21 old bride, making it clear that “[a]t no time have [] I reported that [he] is a
 22 child rapist. . .” and responded to Musk’s email accusations by stating, “I do
 23 not know how anyone could come to that conclusion. . . .” (SF 18, 21, 26, 30);
- 24 • Jared Birchall, Musk’s family office manager tasked by Musk to dig up dirt
 25 on Unsworth, never communicated to Musk that Unsworth was a child rapist

26
 27 ¹ Unsworth recently learned that Musk undertook a second investigation of Unsworth
 28 prior to this litigation, but Musk has refused to provide information about that
 investigation, which was apparently conducted by Cooley, LLP.

- 1 or had a 12-year-old bride, and Birchall confirmed with Howard that “[y]ou
2 have not reported this and I have not communicated it either” (SF 18, 21, 27);
- 3 • Musk knew that none of the information communicated by Howard had ever
4 been verified and that his reports on Tik’s age were conflicting (SF 33, 37);
 - 5 • The only information communicated in writing by Howard about Tik’s age
6 was an inaccurate, unverified statement that Tik was thought to have been 18
7 or 19 years old when she met Unsworth (SF 38-39);
 - 8 • In addition to the \$52,000 fee, Musk and Birchall offered Howard a \$10,000
9 bonus for “successful confirmation of nefarious behavior” by Unsworth – a
10 bonus which was never paid because no such evidence exists (SF 49); and
 - 11 • On August 28, Musk set in motion a scheme for Howard “to immediately
12 move forward with ‘leaking’ this information to the UK press” to plant “an
13 unflattering story” about Unsworth and young girls “without any disclosure
14 that it was coming from Elon Musk or one of his investigators” (SF 55-57).

15 Musk’s motion is based principally on the antithetical bases that, on the one
16 hand, he was not calling Unsworth a pedophile, while on the other hand, he did not
17 harbor serious doubts as to whether Unsworth was actually a pedophile. Prior to his
18 motion, Musk had never publicly asserted that he used the phrase “pedo guy” as a
19 South African childhood insult intended only to describe Unsworth’s demeanor and
20 appearance as a “creepy old man” – a claim that defies the generally understood
21 meaning of the phrase and is contradicted by his own tweets and emails. (SF 85-95).

22 Musk and Birchall agreed to artificially attempt to create defenses of
23 substantial truth and no actual malice by playing a “hide the ball” game of discussing
24 Howard’s findings only by telephone or in person – never in writing. (SF 35).
25 Birchall claims that Howard was “more affirmative” in phone calls that he thereafter
26 conveyed orally to Musk. However, it remains undisputed, as Musk quietly admits
27 in his statement of facts: Musk never heard from any source, verbally or in writing,
28 that Unsworth “married” Tik before she was 18 or 19 years old. Even though it

1 contradicts and contorts every written document that Howard provided, Musk and
2 Birchall claim that, at best, they were told by phone that it was possible that
3 Unsworth *met* his significant other when she was 12 years old, but never that he
4 *married* or started a physical relationship with her at that age. On August 24, 27, and
5 30, Musk received separate written reports stating that Unsworth *met* Tik when she
6 was at least 18 or 19 years old (and married her some years after that) – but less than
7 8 hours after getting the last such report, Musk nonetheless told the BuzzFeed
8 reporter that Unsworth is a child rapist who married a 12-year-old child bride.

9 After he doubled and tripled down on Twitter on the accusation known to
10 describe a pedophile (betting it was true and suggesting truth by Unsworth’s failure
11 to sue (SF 2-3, 7-8)), Musk then paid at least \$52,000 and offered an incentive bonus
12 of \$10,000 to a convicted felon with whom he had no prior relationship to prove
13 whether Unsworth was “another Jeffrey Epstein.” (SF 95). He obtained confidential
14 information on Unsworth’s contacts with his UK legal counsel and orchestrated a
15 malicious, false, and anonymous leak campaign in the UK and Australian press.
16 When that failed, he took matters into his own hands by sending emails to an
17 adversarial reporter, in response to a bona fide request for comment, which stated as
18 a matter of fact false accusations that Unsworth was a child rapist with a 12-year-old
19 child bride. Musk contends that the republication of his email accusations was not
20 reasonably foreseeable despite the undisputed facts that he emailed them to a reporter
21 with whom he had no historical relationship, calling the reporter a “fucking asshole”
22 in the first sentence, has admitted that he wanted the information published whether
23 true or false, and told the reporter that publication is “up to you.” The most accurate
24 description to this defense is set forth by adopting Musk’s description of his conduct:

25 I didn’t expect Buzzfeed to publish an off the record email. My intent
26 was to have them investigate and come to their own conclusions, not
27 publish my email directly. *Still, I’m a fucking idiot.*”

28 (SF 65 (emphasis added)).

1 The truth is that the media was ridiculing Musk about the tube, calling it a PR
 2 stunt, likely because Musk frequently tweeted about it, posting photos and videos.
 3 Musk admitted that “I can see how this would look like a ‘narcissistic PR stunt.’”
 4 (SF 101). When Unsworth, a private person who was pivotal to the cave rescue,
 5 joined the voices of others describing it as a PR stunt, Musk retaliated by trying to
 6 destroy him – making up out of whole cloth and publishing to the world false
 7 accusations that Unsworth is a pedophile and child rapist who married a 12-year-old.

8 With a straight face, Musk unabashedly seeks judgment because he claims
 9 legal protection for accusations of pedophilia against British men who spend time in
 10 Thailand. Musk’s accusations are false, defamatory, and were published negligently
 11 and with actual malice. His motion for summary judgment must be denied.

12 **II. FACTUAL BACKGROUND²**

13 Musk’s factual recitation of his explanation for his accusations, his alleged
 14 reliance on a con man’s flawed and unsubstantiated information, and his efforts to
 15 publicize his accusations to the media is flawed to the point of being dishonest and
 16 not asserted in good faith. Musk knows the truth but will not admit it: Unsworth is
 17 not a pedophile (SF 13); he met his significant other in London in 2011 when she
 18 was 32 years old (*id.*); he had never been to Thailand before 2011 and he has never
 19 been to Pattaya (*id.*); and he is a real-life hero who richly deserved the M.B.E.
 20 conferred upon him by the Queen of England. (Def.’s Stmt. of Uncontr’d Facts 13).

21 **A. Musk Called Unsworth a Pedophile on July 15, 2018.**

22 On July 15, 2018, Musk published a series of tweets regarding Unsworth,
 23

24 ² Musk falsely attacks Unsworth’s role in the rescue, stating that “he did not assist in
 25 the rescue” other than traveling to the cave and having “contacted divers and advised
 26 the rescue team about where the missing boys might be found.” (Mot. at 3). These
 27 superfluous attacks are unfounded. Members of the rescue have declared Unsworth
 28 was “a lynchpin of the operation,” “vital to its planning,” and without his “presence
 at Tham Luang from the start of the rescue all thirteen of the trapped party would
 now be dead.” (DF 5).

1 stating, *inter alia*, “Never saw this British expat guy who lives in Thailand (sus) at
 2 any point when we were in the caves. ... You know what, don’t bother showing the
 3 video. We will make one of the mini-sub/pod going all the way to cave 5 no
 4 problemo. Sorry pedo guy, you really did ask for it.” (SF 1, 85).

5 As of July 15, Musk knew “essentially nothing” about Unsworth and “didn’t
 6 know who in the world he was.” (SF 14). Musk’s “research” consisted of “less than
 7 an hour” on Google where he claims he learned that Unsworth was a Brit living in
 8 Thailand, and that Chiang Rai is a “very dodgy part of the world,” “the capital of sex
 9 trafficking,” and a “hot spot for child prostitution.” (SF 87). Musk also recalled that
 10 “Jared the Subway guy” “was engaged in pedophilia” in Thailand, and that “Gary
 11 Glitter” “went to Thailand from England to have sex with underage kids.” (SF 88).

12 Nevertheless, Musk signed a sworn statement that, to him, “sus” when
 13 following “British expat guy living in Thailand” just meant “weird guy,” and “pedo
 14 guy” meant “creepy old man” because, he says, it “was a common insult used in
 15 South Africa when I was growing up.” (Musk Decl. ¶¶ 25-29).³ He makes no effort
 16 in his declaration to explain his tweets or actions that followed his “pedo guy” tweet.

17 Immediately following his “pedo guy” tweet, Musk doubled down, tweeting:
 18 “Bet ya a signed dollar it’s true” in response to another user’s statement that he had
 19 accused Unsworth of being “a pedo.” (SF 3, 86). In his motion to dismiss, Musk
 20 repeatedly asserted that he was “trading on Thailand’s reputation” and that “the
 21 reasonable reader would make this connection.” (SF 94). Even Musk’s chief of staff
 22 responsible for his public relations, Sam Teller, testified he “understood pedo guy to
 23 be a reference to pedophilia,” because it “was a shortened version of the word.” (SF
 24 90). Other than reading recent media coverage of Musk’s filing of this motion, Teller
 25 testified that he was not familiar with any meaning other than pedophilia. (*Id.*).

26 Over the next few days, Musk received numerous media requests for comment

27 ³ Despite purportedly being such a “common insult,” Musk acknowledged that he has
 28 never said those words publicly. (SF 89-90).

1 on his “pedophile” and “pedophilia” accusations as well as Google alerts with
 2 articles referring to Musk calling Unsworth a “pedophile.” (SF 91). Musk’s PR team
 3 compiled lengthy lists of articles characterizing the accusation as one of pedophilia.
 4 (*Id.*). Instead of Musk or his team clarifying that Musk meant “creepy old man,” they
 5 agreed in writing: “We should definitely just ignore these inquiries.” (*Id.*). On July
 6 17, 2018, Musk tweeted his alleged “apology” without disavowing that pedo guy
 7 meant pedophile, and instead cited his followers and the public to a “well-written
 8 article” that states “the pedophile accusation wasn’t quite random.” (SF 6, 92).

9 Musk continued to make it clear that he was accusing Unsworth of pedophilia.
 10 On August 28, 2018, in response to a tweet that “your dedication to facts and truth
 11 would have been wonderful if applied to that time when you called someone a pedo,”
 12 Musk tripled down by tweeting “You don’t think it’s strange he hasn’t sued me yet?”
 13 (SF 8, 98). It defies common sense to contend that Musk thought that Unsworth
 14 intended to sue him for merely describing him as a “weird” “creepy old man.”

15 **B. The Convicted Felon Investigator Was Told to Use Aggressive Tactics.**

16 Musk certainly was not on a South African playground when he hired and paid
 17 more than \$50,000 to an unknown investigator who turned out to be a con man. Musk
 18 tried to explain the hiring: he wanted an investigation because “maybe he [Unsworth]
 19 is actually a pedophile” and “[w]hat if what we have here is another Jeffrey Epstein?”
 20 (SF 95). In fact, Musk hired him to dig up dirt on Unsworth. (SF 42).

21 The “investigator” initiated contact by sending two emails that immediately
 22 exposed his bias: “Dear Elon, you may wish to dig deep and look into Mr.
 23 Unsworth’s past ... No smoke without fire!” and “Like Elon I think that Mr.
 24 Unsworth has skeletons in his cupboard.” (SF 41). On August 15, 2018, Musk hired
 25 Howard via his family office and put Birchall in charge, a self-admitted
 26 “inexperienced novice” who had never run an investigation. (SF 42-43). Birchall’s
 27 due diligence was “rudimentary” and essentially nonexistent. Birchall admitted that
 28 it would have been a “different process if someone said go out and identify the best

1 investigator in the world.” (SF 44). Birchall merely Googled Howard’s name and the
2 name of his company, Jupiter. (*Id.*). A Google search of “James Howard Jupiter” on
3 August 15, 2018, would have revealed as the very first hit a November 3, 2016,
4 article headlined “Businessman stole £426,000 from company’s accounts...” (SF
5 45). Indeed, Howard is reportedly back in jail. (*Id.*).

6 In an attempt to distance Musk and himself from the investigation, Birchall
7 set up a fake email with the alias “Jim Brickhouse” for his exchanges with Howard,
8 and they referred to Musk only as “the principal.” The scheme included Musk not
9 communicating with Howard, and Musk and Birchall never communicating in
10 writing about the “investigation.” (SF 35, 47; Musk Decl. ¶¶ 33-34).

11 At the outset, the goal was dirt. Birchall emailed Howard on August 24: “Was
12 his current wife the girl he finally settled on after a period of ‘exploring’ the world
13 of underaged Thai girls? Can we get a firm confirmation that they met while she was
14 a minor?” (SF 48). The next day, Birchall informed Howard that “for successful
15 confirmation of nefarious behavior there is an additional \$10k bonus.” (SF 49).
16 Howard was instructed to keep digging, “creatively” and “aggressively.” (SF 33).

17 On August 27, Birchall, with Musk’s input and express authorization,
18 instructed Howard to undertake the campaign to falsely smear Unsworth:

19 We would like you to immediately move forward with ‘leaking’ this
20 information to the UK press. Obviously must be done very carefully. The
21 line of thinking...is: [1] Thailand is the world capital of pedophilia [2] This
22 man has frequented Thailand since the 80’s . . . [3] While the guise of
23 cave exploration is creative, there are amazing and extensive caving
24 systems in many places throughout the world . . . [4] He eventually woman
25 [sic] 30 years his minor – whom he met while she was a teenager [5] He
26 had been going to Thailand for decades before marrying her. She wasn’t
27 the first girl he met – and definitely not the first teenager he interacted
28 with. Share the facts and as you said, that should be enough for a story.

1 (SF 55-57). Howard did share them, under the anonymous email address
 2 “bangkokjohn.” (SF 56). The plan was to “have people question the motive for being
 3 in Thailand,” including “pedophilia,” and to “balance ... a clear imbalance in the
 4 media” created by the mass of negative publicity about Musk. (SF 57).

5 Finally, Birchall requested information on Unsworth’s UK counsel. And when
 6 he began receiving the information allegedly through one of his lawyer’s partners,
 7 Birchall did not try to “put the brakes on” Howard’s conduct. (SF 60-63).

8 **C. No One Told Musk that Unsworth Married or Raped Children.**

9 In perhaps Musk’s most egregious misrepresentation to the Court, he tells the
 10 Court only that Howard “stated to Birchall in a phone call that there was evidence
 11 that Mr. Unsworth met *and began a relationship* with his alleged Thai wife when
 12 she was eleven or twelve years old.” (Mot. 8). Musk’s only nod to the truth is an
 13 oblique footnote on page 8 of his brief, but Musk was in truth repeatedly,
 14 consistently, and without variation told in writing prior to August 28 and August 30,
 15 2018, that Unsworth met his wife, Tik, when she was 18 or 19 years old and married
 16 her when she was at least 23. There is no documented evidence via email or
 17 otherwise that they *met* – much less that they *married* – when she was 12 years old.

18 *First*, on August 24, Howard reported via e-mail that Unsworth and Tik “have
 19 been married for 7 years ...” (SF 22). *Second*, on August 27, Birchall showed he and
 20 Musk were subjectively aware they were not married when she was a child, asking
 21 “When did he marry his wife in Thailand? **2011?**” (SF 23) (emphasis added). *Third*,
 22 on August 27, Howard responded and confirmed as *verified fact* that Unsworth “met
 23 his wife in 2008 in her role as Vice President of the local commune” and stated that
 24 “His wife we believe is 30 *which would have put her at 18/19 when they first met.*”
 25 (SF 24) (emphasis added). *Fourth*, on August 30, at 11:04 am, Howard sent another
 26 written report, again stating “Unsworth met his wife in 2008 ... His wife we believe
 27 is 30 (we will confirm in the next 48hrs) *which would have put her at 18/19 when*
 28 *they first met.*” (SF 25). *Fifth*, on September 1, Howard confirmed in writing Tik’s

1 birthday in “November 1988” and stated that they “met each other in England 11
2 years ago” when Tik was “19 years old.” (SF 39).

3 Musk cannot refute the evidence that (a) Howard **never** told Birchall that
4 Unsworth was a child rapist who married a 12-year-old, and (b) no one **ever** reported
5 to Musk that Unsworth was a child rapist or had a child bride. (SF 18-21). Birchall
6 was unequivocal: he was *never* told that Tik was younger than 18 when she married
7 Unsworth. (*Id.*). At most, he received “conflicting information” with “serious
8 discrepancies” as to ***when they met***, but he never saw any evidence that Unsworth
9 even *met* Tik when she was 12 years old, much less raped or married her. (SF 26-27,
10 29, 30-37). Birchall agreed with Howard in writing on September 4: “There is no
11 confusion where this is concerned. You have not reported this [that Unsworth is a
12 child rapist] and I have not communicated it either.” (SF 26-27). Birchall’s best
13 effort to defend Musk – apparently after getting advice from counsel – was that they
14 were told orally “they were ‘married’ (*or formed a relationship*) in her late teens
15 (you said 18), but that she was quoted in a newspaper saying they ***met*** 7 years prior
16 ... she would have actually been a child/young teenager ***when they first met.***” (SF
17 28-31) (emphasis added). Howard flatly rejected this: “There is a big difference
18 between 19 and 29 I agree, and an even bigger leap to being a child rapist. ***I do not***
19 ***know how anyone could come to that conclusion as neither of us have ever***
20 ***mentioned children or rape in our conversations....***” (SF 30) (emphasis added).

21 Musk admitted that when he emailed information to BuzzFeed on August 30,
22 he was “not sure that it was accurate,” and he did not know if the information he
23 received from Howard “was true or not or had been verified.” (SF 15). By that point,
24 Birchall and Musk had begun to doubt “whether [they] were getting the truth from
25 Mr. Howard.” (SF 34).

26 **D. Republication of the BuzzFeed Emails Was Reasonably Foreseeable.**

27 On August 28, 2018, at 9:41 am, Musk tweeted at a reporter on Twitter: “don’t
28 you think it’s strange he hasn’t sued me.” (SF 69). Seven minutes later, and

1 throughout August 28-29, Musk and Birchall began instructing Howard to falsely
2 smear Unsworth in the UK and Australian press as a pedophile, and Birchall
3 specifically confirmed that Musk “wanted it to be published.” (SF 70-71).

4 On August 29, BuzzFeed reporter Ryan Mac emailed Musk for comment on
5 “the Twitter conversation yesterday.” (SF 9-12, 72). Mac had written a scathing
6 article about Musk on June 21, 2018. (SF 66-67). Musk does “not particularly” have
7 a great deal of respect for BuzzFeed, which had published at least four articles on
8 the cave rescue, two of them by Mac. (SF 67-68). Musk had no pre-existing
9 relationship with Mac. (SF 78). Musk, who is himself newsworthy and has a pre-
10 existing distrust of the media due to years of perceived unwarranted attacks,
11 unilaterally designated and ordered without prior agreement his explosive email to
12 Mac to be “off the record”: “Off the record[.] I suggest that you call people you
13 know in Thailand, find out what’s really going on and stop defending child rapists,
14 you fucking asshole. He’s an old, single white guy from England who’s been
15 traveling to or living in Thailand for 30 to 40 years, mostly Pattaya Beach, until
16 moving to Chiang Rai for a child bride who was about 12 years old at the time...”
17 (SF 12, 73, 79-80).

18 Five days later, Mac responded, advising Musk that his e-mail was not off the
19 record, and rather than fight to keep it confidential, Musk stated: “If you want to
20 publish off the record comments and destroy your journalistic credibility, ***that’s up***
21 ***to you.***” (SF 74 (emphasis added)). David Arnold, another Tesla PR officer,
22 acknowledged that Musk was taking a chance that his email would be published
23 without prior agreement and that Musk increased that risk by repeatedly insulting
24 Mac. (SF 81-84). Mac published later that day on September 4. (SF 74).

25 Musk was clear in his deposition that he “expect[ed] that [Mac] would report”
26 the accusations in his email even “if he did not find any evidence to support it.” (SF
27 76). Musk agreed that in that case, he would have expected Mac to report “[t]hat he
28 had looked into it and could not find any substantiation.” (*Id.*). *That is exactly what*

1 *happened*, and Musk’s entire course of conduct in leaking information to the press,
 2 responding to a request for comment from an adversarial reporter who had already
 3 covered the story, making explosive accusations, unilaterally designating them off
 4 the record before telling the reporter that whether to publish was “up to you,” and
 5 testifying that he wanted it published irrespective of truth or falsity, demonstrates
 6 that it was not only foreseeable to Musk that his accusations against Unsworth would
 7 be republished, but that he authorized and intended that they would be republished.

8 Indeed, on September 4, 2018, Musk offered this assessment of his
 9 foreseeability defense in correspondence with his on-retainer outside PR agent:

10 I didn’t expect BuzzFeed to publish an off the record email. My intent
 11 was to have them investigate and come to their own conclusions, not
 12 publish my email directly. *Still, I’m a fucking idiot.*

13 . . .

14 I . . . responded in what I felt was off the record. In the past, BuzzFeed
 15 has respected emails prefaced with “off the record,” but this time they
 16 did not. *It was still one of the dumbest things I’ve ever done. . . .*

(SF 65 (emphasis added)).

17 **III. ARGUMENT**

18 Musk’s motion does not challenge the falsity of the defamatory statements
 19 contained in his emails or tweets. Despite Musk’s misleading and inaccurate
 20 statements of purported fact in his brief, it is undisputed that Unsworth never married
 21 a child bride and is not a pedophile or child rapist. (SF 13). Musk also does not
 22 challenge that his accusations were capable of a defamatory meaning – it is
 23 indisputably defamatory *per se* to call someone a pedophile and a child rapist. *See,*
 24 *e.g., Grenier v. Taylor*, 234 Cal. App. 4th 471, 486-87 (2015) (“[The] statements are
 25 not mere insults . . . Rather, they accuse [plaintiff] of criminal conduct that includes
 26 vile and depraved activities, i.e., child molestation.”). Additionally, Musk does not
 27 challenge that there is ample evidence of negligence in the event this Court holds
 28

1 that Unsworth is a private figure – Musk contests only the sufficiency of the evidence
2 of actual malice and foreseeability of the republication of his BuzzFeed emails.⁴

3 Musk’s bases for seeking summary judgment therefore are limited to claims
4 that: (1) Unsworth is a limited public figure and therefore required to establish actual
5 malice in order to recover compensatory damages; (2) Musk did not publish with
6 actual malice because he was relying on portions of information learned from his
7 paid investigator; and (3) it was not reasonably foreseeable that BuzzFeed would
8 publish his emails to Mac. Each of these arguments fails.

9 **A. Unsworth Is a Private Figure.**

10 While Unsworth has demonstrated that a genuine issue of material fact exists
11 as to actual malice, *see infra* at Section B, Unsworth should be classified as a private
12 figure plaintiff, not a “limited purpose” public figure, as Musk argues. Musk
13 “bear[s] the burden of proving the plaintiff’s public figure status.” *Dawe v.*
14 *Corrections USA*, 2010 WL 682321, at *10 (E.D. Cal. Feb. 24, 2010) (citation
15 omitted). “A fairly high threshold of public activity is necessary to elevate a person
16 to public status.” *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 745 (1989).⁵

17 A “limited public figure” is a person “who has ‘achieved fame or notoriety
18 based on their role in a particular public issue.’” *Prendeville v. Singer*, 155 Fed.
19 Appx. 303, 305 (9th Cir. 2005) (citation omitted). The Ninth Circuit has recognized
20 a conjunctive three-part standard for a limited public figure: (1) whether “a public
21 controversy existed when the statements were made”; (2) “whether the alleged
22 defamation is related to the plaintiff’s participation in the controversy”; and
23 (3) “whether the plaintiff voluntarily injected [him]self into the controversy for the
24 purpose of influencing the controversy’s ultimate resolution.” *Makaeff*, 715 F.3d at

25 ⁴ *See, e.g., Khawar v. Globe Int’l, Inc.*, 19 Cal. 4th 254, 279 (1998) (“[E]vidence that
26 is sufficient to support a finding of actual malice is usually, and perhaps invariably,
27 sufficient [to show] negligence.”).

28 ⁵ This standard is “a pure constitutional question,” *see Makaeff v. Trump Univ., LLC*,
715 F.3d 254, 270 (9th Cir. 2013), but state court decisions are considered.

1 266. Musk cannot satisfy any one of these prongs, much less all three of them.

2 A private person “is not automatically transformed into a public figure just by
3 becoming involved in or associated with a matter that attracts public attention.” *Z.F.*
4 *v. Ripon Unified Sch. Dist.*, 482 F. App’x 239, 240-41 (9th Cir. 2012) (citation
5 omitted). A defendant “must show more than mere newsworthiness to justify
6 application of the demanding burden” of proving actual malice. *Id.* at 241. The
7 standard is “whether a reasonable person would have concluded that this individual
8 would play or was seeking to play a major role in determining the outcome of the
9 controversy and whether the alleged defamation related to that controversy.”
10 *Waldbaum v. Fairchild Pubs., Inc.*, 627 F.2d 1287, 1298 (D.C. Cir. 1980).

11 Even when one thrusts himself into a public controversy, he becomes a public
12 figure only “for a limited range of issues.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,
13 351 (1974). A person’s credentials may be relevant “[w]here the issue turns on expert
14 or specialized knowledge. . .” but the defamatory statements must be “germane” to
15 the public controversy. *Copp v. Paxton*, 45 Cal. App. 4th 829, 846 (1996).

16 **1. No Public Controversy at the Time of the Defamation**

17 Musk suggests two possible public controversies – “how to rescue” the boys
18 and “the viability of Mr. Musk’s submarine.” (Mot. 12-13).⁶ Neither of these
19 qualifies because (1) a “public controversy” is limited to “a real dispute, the outcome
20 of which affects the general public or some segment of it”; and (2) the public
21 controversy must have “existed when the statements were made.” *See Makaeff*, 715
22 F.3d at 266-67 (citation omitted). There was no “public controversy” over the rescue
23 of the boys – the articles Musk submitted show only that the rescue was international
24 news as everyone involved worked on the best strategy for saving the boys. (Mot.
25 Exs. 3-6, 20). There certainly could be no “public controversy” over “how to rescue”
26 the boys as of July 15, *after* the boys were rescued. (DF 5). In any case, the

27
28 ⁶ Musk does not assert a public controversy over pedophilia. *See, e.g., Grenier*, 234
Cal. App. 4th at 484-85 (“The subject of morality is too general and amorphous....”).

1 technique by which the boys had been rescued does not affect “the general public or
2 some segment of it.” Although the viability of the tube was a dispute among some,
3 Musk does not explain how that issue would affect the general public. And, again,
4 all of the statements at issue were made after the cave rescue was completed. (*Id.*).

5 **2. Unsworth Did Not Attempt to Influence Any Controversy**

6 Even assuming there was a public controversy, to be treated as a limited
7 public figure, Unsworth “must have ‘thrust [himself] to the forefront’ of that
8 controversy ‘in order to influence the resolution of the issues involved.’” *Makaeff*,
9 715 F.3d at 267 (citing *Gertz*, 418 U.S. at 345). But “responding to press inquiries
10 . . . does not necessarily mean that [one] is attempting to play a significant role in
11 resolving a controversy.” *Jankovic v. Int’l Crisis Grp.*, 822 F.3d 576, 588 (D.C. Cir.
12 2016) (citation omitted). A plaintiff does not become a limited public figure by
13 providing the media a “short simple statement of his view of the story,” but rather
14 by using “his position in the controversy as a fulcrum to create public discussion.”
15 *Id.* (citations omitted); *see also Time, Inc. v. Firestone*, 424 U.S. 448, 455 n.3 (1976)
16 (plaintiff who “held a few press conferences” was not limited public figure).

17 To the extent there was any controversy over the viability of the tube or the
18 cave rescue, Unsworth did not “engage[] the attention of the public in an attempt to
19 influence the resolution of the issues involved.” *Wolston v. Reader’s Digest Ass’n*,
20 *Inc.*, 443 U.S. 157, 168 (1979); *see also Hutchinson v. Proxmire*, 443 U.S. 111, 135
21 (1979) (no limited public figure where plaintiff “did not thrust himself or his view
22 into public controversy to influence others”). Nor did Unsworth assume any “special
23 prominence in the resolution” of any dispute. *See Wolston*, 443 U.S. at 168.
24 Unsworth’s only identified public statement about the tube was a few sentences in
25 response to a question by the CNN reporter. (DF 32, 34).

26 **3. Defamation Not Germane to Participation in Controversy**

27 Musk’s attempt to tie his accusation that Unsworth is a “pedophile” and a
28 “child rapist” to a purported “public controversy” is nonsensical. He cannot explain

1 how his accusations could be germane to the tube's viability and argues only that
2 they were germane to a dispute over the rescue because they "related to Mr.
3 Unsworth's motives for participating in the rescue and seeking continued media
4 attention and proximity to the rescued children." (Mot. 16). But the germaneness
5 requirement "ensures that publishers cannot use an individual's prominence in one
6 area of public life to justify publishing negligent falsehoods about an unrelated
7 aspect of the plaintiff's life." *Jankovic*, 922 F. 3d at 589. *See generally Grenier*,
8 234 Cal. App. 4th at 485 (although a pastor "thrust himself" into the public eye "as
9 an expert on the Bible and its teachings," he was not a public figure for accusations
10 involving "private conduct . . . such as child abuse and theft" because he "did not
11 thrust himself into a public controversy or dispute regarding child abuse, child
12 molestation"). Musk's accusations about Unsworth's sexual predilections were not
13 germane to any controversy concerning the tube or Unsworth's motives.

14 Musk's claim that his accusations related to Unsworth's "motives" is
15 contradicted by Musk's own testimony. Under Musk's theory, the defamatory
16 accusations could be germane only if Musk was in fact accusing Unsworth of being
17 a pedophile when he tweeted that he was "sus" and a "pedo guy," which is what
18 Musk contends in *this* portion of the brief. (*See* Mot. 15).⁷ This contention, however,
19 directly contradicts other portions of Musk's brief and his own declaration in which
20 he contends that "[t]he insult, as Mr. Musk understood and used it, is not meant to
21 accuse a person of pedophilia but rather insults a person's appearance. . . ." (Mot.
22 58; *see also* Musk Dec. ¶¶ 28-29). How could accusations that Unsworth was a
23 pedophile bear on "the legitimacy of efforts made to assist in the rescue and the
24 motivations for such assistance," (*see* Mot. 16), when Musk testified under oath that
25 he did not know who Unsworth was, did not know he was involved in the cave
26 rescue, and was merely insulting his appearance? Particularly when the tweets were

27 ⁷ Musk stoops so low as to try to cleverly tie his accusation of pedophilia to the cave
28 rescue by suggesting that Unsworth may have wanted to molest the underage boys.

1 made *after* the alleged controversy – how to save the boys – was resolved?

2 Musk cannot have it both ways – either he was accusing Unsworth of being a
3 pedophile, or he was not. Either way, that accusation was not germane to any “public
4 controversy” and certainly not to any public controversy into which Unsworth
5 voluntarily “thrust himself” in an attempt “to influence” the resolution.

6 **B. All of Musk’s Accusations Were Published with Actual Malice.**

7 Even if Unsworth is treated as a limited public figure, Musk’s motion for
8 summary judgment must be denied because a jury could find clear and convincing
9 evidence that Musk published all of the accusations negligently and with actual
10 malice. Actual malice is defined as publishing “with knowledge that it was false or
11 with reckless disregard of whether it was false or not.” *New York Times v. Sullivan*,
12 376 U.S. 254, 280 (1964). This Court has explained that “reckless disregard” “(1)
13 encompasses a defendant’s ‘high degree of awareness of . . . probable falsity,’ or
14 ‘serious doubts as to the truth’ of the publication, or (2) applies if the defendant had
15 ‘obvious reasons to doubt the veracity’ of its statements, but engaged in ‘purposeful
16 avoidance of the truth.’” *D.A.R.E. Am. v. Rolling Stone Mag*, 101 F. Supp. 2d 1270,
17 1277–78 (C.D. Cal. 2000), *aff’d*, 270 F.3d 793 (9th Cir. 2001) (citations omitted).

18 Direct evidence of actual malice “is extremely difficult to obtain, so actual
19 malice may be proven by circumstantial evidence. . . .” *Id.* “[E]vidence of
20 negligence, of motive and of intent may be adduced for the purpose of establishing,
21 by cumulation and by appropriate inferences, the fact of a defendant’s recklessness
22 or of his knowledge of falsity,” and factors that may be considered include “[a]
23 failure to investigate,” “anger and hostility toward the plaintiff,” and “reliance on
24 sources known to be unreliable . . . or known to be biased against the plaintiff.”
25 *Reader’s Digest Ass’n v. Superior Court*, 37 Cal. 3d 244, 257-58 (1984).
26 Additionally, although the actual malice standard is subjective:

27 **a defendant cannot “automatically insure a favorable verdict by**
28 **testifying that he published with a belief that the statements were true.**

1 The finder of fact must determine whether the publication was indeed
 2 made in **good faith**. Professions of good faith will be unlikely to prove
 3 persuasive . . . **where a story is fabricated by the defendant**, is the
 4 product of his imagination, or is based wholly on an unverified anonymous
 5 telephone call. Nor . . . when the . . . allegations are so inherently
 6 improbable that only a reckless man would have put them in circulation.”

7 *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (emphasis added)).

8 Musk attempts to graft an additional requirement onto actual malice based on
 9 *Good Gov’t Group of Seal Beach, Inc. v. Superior Court*, 22 Cal. 3d 672 (1978), but
 10 that case merely addresses the standard for establishing actual malice when the
 11 words used are ambiguous. The evidence here supports a finding that Musk “knew
 12 or acted in reckless disregard of whether his words would be interpreted by the
 13 average reader as defamatory statements of fact.” *Id.* at 684.⁸ Although Musk now
 14 claims (at times) that he was not subjectively calling Unsworth a “pedophile” when
 15 referring to him as “pedo guy,” that is contradicted by every other piece of evidence
 16 in the record – including Musk’s own tweet betting “it’s true” and his failure to
 17 clarify that point in response to numerous requests for comment expressing an
 18 understanding that the accusation was that he was a pedophile. (SF 85-100). Musk’s
 19 self-serving statement about a “creepy old man” – which he apparently never
 20 mentioned until his deposition – is simply not credible and certainly does not warrant
 21 summary judgment. (*See id.*). There can be no reasonable doubt that the context of
 22 his first “pedo guy” tweets and subsequent actions in public conveyed to the world
 23 that he meant to label him a pedophile as a matter of fact, as this Court already held.⁹

24
 25 ⁸ *See also Good Gov’t* at 685-86 (denying summary judgment where “a jury could
 26 conclude . . . defendants were aware that the words . . . could be interpreted as
 27 defamatory statements of fact instead of ‘allegorical language’” when they
 continued distributing the article “as originally printed” even “after the retraction”).

28 ⁹ In his motion to dismiss, Musk asserted that “the reasonable reader would make this
 connection” between Thailand and pedophilia. (SF 94). Musk did so, testifying that

1 Musk bears the burden as a movant to establish a prima facie case that he “had
2 a subjective good faith belief in the truth of the defamatory statements.” *Antonovich*
3 *v. Superior Court*, 234 Cal. App. 3d 1041, 1050-51 (1991). If he cannot make this
4 prima facie showing, then “[f]rom the absence of such evidence the trier of fact could
5 conclude that the statements were based on speculation or fabricated.” *Id.* at 1051.

6 **1. The July 15 Tweets**

7 When Musk tweeted on July 15, he admittedly knew “essentially nothing”
8 about Unsworth – and yet accused this stranger of being a *pedophile*. (SF 14). This
9 is the very heart of publishing with actual malice, where there is absolutely no factual
10 basis to support an accusation that is nothing more than a lie made up out of whole
11 cloth. *See St. Amant*, 390 U.S. at 732 (publication not made “in good faith ... where
12 a story is fabricated by the defendant”). While Musk fails to assert a good faith belief
13 as of July 15 that Unsworth was a pedophile, he contends he acted in good faith
14 because “before publishing the tweets,” he “*did* research Mr. Unsworth” and
15 discovered that he lived in an area of Thailand “that was known as the ‘child sex
16 trafficking capital of the world.’” (Mot. 25). Thus, Musk admits that in his July 15
17 tweets, he was calling Unsworth a pedophile and that he was doing so based solely
18 on his (false) belief that Unsworth was an older white man living in the “child sex
19 trafficking capital.” Musk had no other information about Unsworth. (SF 14).

20 There is no possibility that a good faith belief that someone is a *pedophile*
21 could arise solely from the (unverified) fact that the person spends time in an area of
22 the world where there is a reported child sex trafficking problem. In this case, Musk
23 admitted that he was angry over the negative coverage of the tube – indeed, his team
24 had spent significant effort prior to July 15, even before the boys were rescued, to
25 obtain positive press for the tube after a Thai governor said that it was “not practical”
26 and “doesn’t fit with our mission.” (SF 6, 101-117). Unsworth’s interview struck the

27 Thailand is a “dodgy” place with people up to “no good,” like “Jared the Subway
28 guy” and “Gary Glitter,” who went there “to engage in pedophilia.” (SF 88).

1 match to turn Musk’s internal smoldering over this criticism into a public firestorm
 2 where he sought to shift the media discussion away from the useless tube and turn it
 3 towards Unsworth with a false accusation of pedophilia. (SF 57).

4 Musk argues either that he did not intend to call Unsworth a pedophile, which
 5 is not credible, or that he based his statement on a Google search about Chiang Rai;
 6 but Musk does not even contend that he believed Unsworth was a pedophile when
 7 he first made the accusation. (SF 14). Musk has failed to satisfy his burden to
 8 establish a prima facie case for summary judgment regarding the July 15 tweets. *See*
 9 *Antonovich*, 234 Cal. App. 3d at 1051 (“The record is in fact devoid of any factual
 10 basis to support a subjective belief, good faith or otherwise, on the part of [defendant]
 11 that the . . . defamatory statements were true at the time they were uttered. . .”).

12 2. The August 28 Tweet

13 With respect to his August 28 tweet, Musk claims that “[h]is tweet and
 14 suspicions were supported by the information he received,” from the investigator
 15 “that Mr. Unsworth had **married a teenager**, frequently visited Thailand since the
 16 1980s, and **was known to prefer the company of young women.**” (Mot. 21
 17 (emphasis added)).¹⁰ Even if true, such a report would not support an accusation of
 18 pedophilia. But the statement is not supported by the record and is instead another
 19 of the intentional deceptions that Musk peddles like a snake oil salesman.

20 Nobody ever told Musk that Unsworth had married a teenager or was known
 21 to prefer the company of young women – not before or after August 28. (SF 18-21).
 22 On August 24, Howard reported that Unsworth and Tik “have been married for 7
 23 years.” (SF 22). On August 27, Birchall himself demonstrated this understanding,
 24 asking “When did he marry his wife in Thailand? 2011?” (SF 23). On August 27,
 25 Howard advised Birchall that he “kn[e]w as fact” that Unsworth met Tik in 2008

26
 27 ¹⁰ Again, it is nonsensical for Musk to argue that the tweet “does not mean that he is
 28 a pedophile” while simultaneously claiming that his factual basis for making the
 tweet was a report that Unsworth, *inter alia*, prefers the company of young women.

1 while she was working as Vice President of the local commune and was “in the
2 process of verifying” that she was “18/19 when they first met.” (SF 24).

3 Moreover, by August 28, Musk was already “concern[ed]” whether Howard
4 was a legitimate investigator and whether the information he was providing was
5 accurate, because he knew that Howard had not verified any of the information in
6 his reports, and his reports were “inconsistent” and had a “serious discrepancy” as
7 to Tik’s age. (SF 33-34). It is undisputed that in **all** of Howard’s written reports, he
8 stated his unconfirmed belief that Tik was 18 or 19 when she met Unsworth, and
9 never said she was younger. (SF 18-20, 22-25, 32, 38-39).

10 Musk’s August 28 accusation that Unsworth was a pedophile was not “made
11 in good faith” and is little more than “the product of [Musk’s] imagination” or based
12 on “an unverified anonymous telephone call.” *See Reader’s Digest Ass’n*, 37 Cal.
13 3d at 257. It was either made up out of whole cloth like his July 15 tweet or so
14 willfully and maliciously embellished as to establish actual malice. *See, e.g., Masson*
15 *v. New Yorker Mag., Inc.*, 501 U.S. 496 (1991) (actual malice where defendant alters
16 source quote “which alteration results in a material change in the meaning
17 conveyed”); *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1176 (S.D.N.Y. 1984)
18 (malice may be established when defendant “knowingly or recklessly misstates the
19 evidence to seem more convincing or condemnatory than it is” or if “it distorts
20 statements of witnesses so that they seem to say more than in fact was said”).

21 **3. The August 30 Emails**

22 Musk contends that the accusations in his August 30 emails to Mac were made
23 in good faith because they were “information that he understood had been uncovered
24 by a private investigator.” (Mot. 17). However, Musk admitted in his deposition that
25 when he sent the information in his emails to Mac, “***I was not sure that it was***
26 ***accurate. . .***” (SF 15 (emphasis added)). As discussed *supra*, by August 28, and
27 certainly by August 30, Musk had begun to doubt the credibility of Howard, because
28 he was providing inconsistent information and had not verified any of the

1 information about Unsworth or Tik. (SF 33-34). Musk cannot possibly now contend
2 in good faith that he believed his accusations were true when he testified under oath
3 that he did not know if they were true or false.

4 The evidence is undisputed that neither the investigator nor Birchall ever said
5 that Unsworth was a child rapist, and neither of them ever told Musk that. (SF 18,
6 21, 32). Neither the investigator nor Birchall ever said that Unsworth had a child
7 bride who was 12 years old, and neither of them ever told Musk that. (SF 18, 21,
8 38). As Howard told Birchall after Musk's accusations were published by BuzzFeed,
9 ***"I do not know how anyone could come to that conclusion"*** as neither of us have
10 ever mentioned children or rape in our conversations. . . ." (SF 30) (emphasis
11 added)). Every single written communication from Howard reflects his belief that
12 Tik was 18 or 19 when she met Unsworth. (SF 22-27, 30). Musk has no source or
13 evidence whatsoever to support his accusation that Unsworth was a "child rapist" or
14 had "a child bride who was about 12 years old."

15 Moreover, the August 30 emails were not published by BuzzFeed until
16 September 4, and Musk had an opportunity to try to stop their publication when Mac
17 reached out to him on September 4 and declined his "off the record" request. Musk
18 had received another written report from Howard on September 1 that concluded
19 that Tik was 30 years old, that she and Vern met when she was 19 years old, that
20 "[t]he reason [Unsworth] has chosen to live in Chiang Rai is because of the extensive
21 local cave networks," and that "Chiang Rai has plenty of interesting caves. . . ." (SF
22 39). Instead of sharing any of this information with Mac and correcting his previous
23 false accusations against Unsworth, Musk conveyed additional falsehoods,
24 questioning what Unsworth was doing "in Pattaya Beach for the better part of a
25 decade when there are no caves of note in the area." (SF 40).

26 Musk's statements to BuzzFeed were either maliciously made up or so
27 antithetical to the information he possessed that he cannot have made them in good
28 faith; even Howard's written reports of Unsworth's travel history were expressly

unverified, and the investigation was ongoing. (SF 33). “Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.” *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) (citations omitted); *see also Antonovich*, 234 Cal. App. 3d at 1053 (“[T]he trier of fact was entitled to find that [defendant]’s ‘inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the subject] charges,’ which is a ‘purposeful avoidance of the truth’ and will support a finding of actual malice.”) (quoting *Harte-Hanks*, 491 U.S. at 692).

C. Republication of the August 30 Emails Was Reasonably Foreseeable.

There are two bases for Unsworth’s defamation claim on the August 30 emails. First, Musk published the false and defamatory statements to Mac on August 30.¹¹ Second, it was reasonably foreseeable that the accusations Musk conveyed to Mac would be republished by BuzzFeed, and Musk is therefore liable for the republication of his accusations against Unsworth by BuzzFeed on September 4.¹² The only issue is whether there is a question of fact for a jury as to whether the republication was intended, authorized, or reasonably foreseeable by Musk.

In California, “the repetition by a new party of another person’s earlier defamatory remark also gives rise to a separate cause of action for defamation against the *original defamer*, when the repetition was reasonably foreseeable.” *Shively v. Bozanich*, 31 Cal. 4th 1230, 1243 (2003). It is not necessary that the defamatory statements be republished verbatim, but if the defendant “furnishes defamatory

¹¹Musk falsely contends that Unsworth sued only on republication of the accusations. (Mot. 20 n.8). Unsworth pled a claim based both on BuzzFeed’s republication and on Musk’s initial publication of the accusations. (Dkt. 1 ¶¶ 88-95, 113; DF 105).

¹²Musk’s claim that BuzzFeed’s “failure to verify” Musk’s accusations about Unsworth “break[s] any causal chain” is deservedly buried in a footnote. (Mot. at 21 n.10). If the republication was foreseeable, then there is by definition a causal link, as explained by the case cited by Musk in his footnote. (*Id.*).

1 material to a publisher with the expectation that the material (*either verbatim or in*
 2 *substance*) will be published, the source should be liable for the publication.”
 3 *Mitchell v. Superior Court*, 37 Cal. 3d 268, 281 (1984) (emphasis added) (“The rule
 4 imposing liability for republication . . . turns on foreseeability, not exact
 5 reproduction.”). A defendant who gives “a statement to a representative of a
 6 newspaper authorizing or intending its publication is responsible for any damages
 7 caused by the publication.” *Id.* It is axiomatic that it is reasonably foreseeable that
 8 statements to a reporter will be republished: “[t]here could be no question that [he]
 9 **ought to have anticipated republication of statements made to inquiring**
 10 **reporters.** This was clearly the purpose for which the reporters sought information.”
 11 *Stoneking v. Briggs*, 254 Cal. App. 2d 563, 577 (1967) (emphasis added).

12 Musk himself has admitted that he reasonably should have expected the
 13 accusations in his emails to Mac to be published. In an email exchange with his
 14 outside public relations consultant, Musk wrote that although his intent was for
 15 BuzzFeed “not [to] publish my email directly,” “[s]till, I’m a fucking idiot.” (SF
 16 65 (emphasis added)). Moreover, Musk admitted that although “[i]n the past,
 17 Buzzfeed has respected emails with ‘off the record,’ [] this time they did not” and
 18 noted that “[i]t was still one of the dumbest things I’ve ever done. . . .” (*Id.*
 19 (emphasis added)). Regardless of what his *expectations* were, it is clear from Musk’s
 20 own emails that he recognized that BuzzFeed had the *right* to publish the information
 21 contained in his emails. It was up to BuzzFeed whether to “respect[]” emails
 22 prefaced with “off the record,” which means that it was reasonably foreseeable that
 23 BuzzFeed would republish the emails. An agreement for information to be “off the
 24 record” is a contractual obligation that requires agreement by both parties. *See, e.g.,*
 25 *Cohen v. Cowles Media*, 501 U.S. 663, 665, 671 (1991) (holding that journalists
 26 could be held liable “for breach of a promise” to “keep [a source’s] identity
 27 anonymous”). There was no such agreement here. (SF 73).

28 Indeed, Musk had no reason to believe that BuzzFeed would honor his “off

1 the record” request. Mac and BuzzFeed had already written multiple articles about
 2 Musk’s tweets (SF 68); Mac had previously written a scathing rebuke of Musk (SF
 3 66); Musk insulted Mac throughout his emails, including by calling Mac a “fucking
 4 asshole” in the first line of his email (SF 77); and Mac had reached out to Musk for
 5 comment in the first place. (SF 72). As Arnold testified, Musk was taking a chance
 6 that the information would be published without a prior agreement regarding “off
 7 the record,” and this risk was increased by Musk’s insults to Mac. (SF 81-84).

8 Although Musk may have superficially lamented BuzzFeed’s publication of
 9 *his emails*, there is evidence that he intended for BuzzFeed to publish the *information*
 10 *contained* in those emails. As discussed *supra*, Musk undertook a scheme to have
 11 false information “leaked” to the UK press to generate negative publicity about
 12 Unsworth. (SF 55). And Musk agreed during his deposition that he expected the
 13 information to be published *regardless of whether it was verified or not*. (SF 76).

14 Musk even had a second chance – whether or not it was foreseeable on August
 15 30 that the emails would be republished by BuzzFeed, it certainly was foreseeable
 16 as of September 4, when Mac emailed Musk to tell him that. (DF 75). Instead of
 17 reiterating his alleged intent that the content or emails be off the record, Musk
 18 expressly stated to Mac: “If you want to publish off the record comments and destroy
 19 your journalistic credibility, **that’s up to you.**” (SF 75 (emphasis added)).

20 It was “reasonably foreseeable” that BuzzFeed would publish the explosive
 21 accusations made by “Elon Musk” against Unsworth. The test is objective and
 22 measured by a reasonable person with no special treatment for the rich and powerful.

23 **IV. CONCLUSION**

24 For the reasons set forth herein, Plaintiff Vernon Unsworth requests that this
 25 Court deny Defendant Elon Musk’s Motion for Summary Judgment in its entirety.

26 Dated: October 7, 2019

L. LIN WOOD, P.C.

27 By: /s/L. Lin Wood

L. Lin Wood

28 *Attorneys for Plaintiff Vernon Unsworth*

CERTIFICATE OF SERVICE

I am employed in the Fulton County, State of Georgia. I am over the age of eighteen years and not a party to the within action; my business address is 1180 West Peachtree Street, Suite 2040, Atlanta, GA 30309.

I hereby certify that a true and correct copy of the document titled “PLAINTIFF VERNON UNSWORTH’S BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT” has been served via electronic mail transmission on October 7, 2019, to all counsel of record who are deemed to have consented to electronic service via the Court’s CM/ECF system and who have otherwise agreed to electronic service. The electronic mail transmission was made from twilson@linwoodlaw.com, by transmitting PDF format copies of the document to all counsel of record, at the e-mail address provided to the Court’s CM/ECF system. The transmission was reported as complete and without error.

Executed on October 7, 2019, at Atlanta, Georgia.

/s/ G. Taylor Wilson